**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **WILLIE F. BIGGHAM** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **U.S.D. #475** | ) | |
| Respondent | ) | Docket No. **1,019,929** |
| | ) | |
| AND | ) | |
| | ) | |
| **KS. ASSOC. OF SCHOOL BOARDS** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the November 13, 2007 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on April 8, 2008.

### APPEARANCES

Bruce A. Brumley of Topeka, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board, the parties agreed that claimant's pre-injury average gross weekly wage was $381.66 and after May 23, 2006, when fringe benefits were discontinued, it increased to $445.01.

### ISSUES

The parties agreed claimant suffered a work-related injury on August 16, 2004. But they were unable to agree on the nature and extent of his disability. Claimant argued that he was entitled to compensation for a work disability (a permanent partial general disability greater than the functional impairment rating). Respondent argued that claimant was limited to his percentage of functional impairment because he quit his employment without

attempting offered accommodated employment that would have paid the same as his pre-injury average gross weekly wage.

The Administrative Law Judge (ALJ) found claimant did not make a good faith effort to retain accommodated employment that would have paid the same wage as claimant was earning before his work-related injury and claimant failed to make a good faith job search after quitting employment with respondent. Consequently, the ALJ limited claimant's compensation to a 5 percent functional impairment to the body as a whole.

The claimant requests review and argues he is entitled to a 47.75 percent work disability based upon a 58.5 percent task loss and a 37 percent wage loss. Claimant further argues that he did not voluntarily quit his employment and instead was terminated without the opportunity to attempt the accommodated job. In the alternative, claimant argues the ALJ went outside the record to determine claimant's functional impairment and at a minimum a split of the rating doctors' opinions would result in a 13 percent functional impairment.

Respondent argues claimant voluntarily terminated his employment and after that he did not make a good faith effort in finding comparable employment, therefore the claimant should be limited to his functional impairment. Respondent further argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of claimant's disability.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Willie Biggham was employed as a custodian for respondent. On August 16, 2004, claimant and three co-workers were moving an old round mat weighing 400-500 pounds from the locker room to an equipment storage facility. These four individuals were asked to place the mat onto a four-wheel cart and then wheel it over to storage. While they were lifting the mat (two on each end) one individual dropped his end which caused claimant to bend over more and he suffered an injury to the lower back. Claimant felt severe pain into his legs. He advised the head custodian that he hurt his back and went home. Later that evening claimant sought medical treatment at the hospital's emergency room.

Respondent referred claimant to Dr. Jenkins who then later referred him to Dr. Florin Nicolae. Dr. Nicolae ordered an MRI and also steroid injections. On January 4, 2005, Dr.

Chris Wilson performed a surgical right L4-L5 hemilaminectomy on claimant's back. Unfortunately, the procedure did not alleviate claimant's back pain and symptoms. Consequently, on October 26, 2005, Dr. Wilson performed a second surgical laminectomy for a recurrent disk bulge at L4-L5 on claimant's back. Claimant continued to complain of back pain and was later referred to Dr. Douglas Burton.

Dr. Burton first saw claimant on March 7, 2006. Claimant complained of back and bilateral leg pain. Dr. Burton diagnosed claimant with two-level degenerative disk disease. The doctor discussed treatment options which included another surgery or an intensive trial of therapy or work conditioning. Claimant opted for additional physical therapy. Dr. Burton imposed temporary restrictions of a 15 pound lifting limitation, no bending or stooping and a four-hour a day work restriction. But the doctor noted the four-hour work restriction was so claimant could go to work conditioning the other four hours.

Claimant returned to work for respondent and Dr. Burton's temporary restrictions were accommodated. But claimant would only sporadically show up to work and a pattern developed where claimant would neither show up for work nor tell his supervisor that he would not be coming in to work. Moreover, claimant's supervisor noted that when claimant did show up for work he would frequently leave in the middle of his shift without permission.

Dr. Burton sent claimant for a functional capacities evaluation (FCE) and on May 9, 2006, determined claimant was at maximum medical improvement and imposed permanent restrictions. The doctor adopted the FCE report which placed claimant in the medium work category. The lifting restrictions were no frequent lifting more than 25 pounds, no occasional lifting more than 50 pounds and no constant lifting more than 10 pounds. And those restrictions were for an eight-hour work day.

Respondent's supervisor, Jeanne Trudo, met with claimant on May 23, 2006, to discuss the permanent restrictions from Dr. Burton. A meeting was conducted with claimant, Mr. Richard Hall, Ms. Jeanne Trudo, Mr. Bud Jackson and Ms. Sarah Talley. Ms. Trudo intended to continue to accommodate the previous temporary restrictions against stooping and bending as well as allowing claimant to rest if necessary to avoid standing too much. And claimant was to be provided assistance with lifting. Moreover, the claimant was to receive the same wage he received before his injury. At the meeting claimant argued that he could not work a full eight-hour day. Ms. Trudo told him he was expected to work eight hours as he was not restricted to a four hour work day and he should report to work for his shift that afternoon. But claimant was also told that if he was unable to work a full shift he should get a doctor's slip. Claimant simply did not return to work that afternoon to attempt the accommodated job. Because claimant never returned to work he was eventually notified that he was terminated from employment.

The statutory language at issue is found in K.S.A. 44-510e(a) which states:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Accordingly, the statute limits a claimant to compensation based upon the functional impairment so long as claimant is earning a wage equal to 90 percent or more of the pre-injury average weekly wage.

If claimant refuses to accept or even attempt to perform reasonably offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation.[1] Even if accommodated work is not offered, claimant still must show he made a good faith effort to find employment. If claimant did not make a good faith effort, a wage will be imputed to claimant based on the evidence in the record as to claimant's earning ability.[2]

The respondent offered claimant accommodated work which was not only within the restrictions imposed by Dr. Burton but actually more restrictive in an effort to assist claimant in retaining his job. Dr. Burton reviewed the proposed work tasks and concluded they were within claimant's restrictions and he should be able to perform those job duties. Ms. Trudo testified that the accommodated job would have paid claimant the same wage he was earning when he suffered his accident. But claimant simply refused to even attempt the offered accommodated work.

The Board therefore concludes the wage claimant was earning and would have continued to earn had he continued working for respondent should be imputed to him. As this was the same as his pre-injury average weekly wage, claimant's permanent partial general disability award is based upon his permanent functional impairment.[3]

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997). But an analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as our Supreme Court has recently said that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland.* See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *rev. denied* (May 8, 2007); and *Graham v. Dokter*, 284 Kan. 547, 161 P.3d 695 (2007).

[3] See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999); *Mahan v. Clarkson Constr. Co.*, 36 Kan. App.2d 317, 138 P.3d 790 (2006).

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[4] The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[5] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[6]

Dr. Burton rated the claimant using the AMA *Guides*[7] and based upon the DRE Lumbosacral Category III opined claimant suffered a 10 percent permanent partial functional impairment. Dr. Zimmerman rated the claimant using the AMA *Guides* but he utilized the range of motion model and opined claimant suffered a 21 percent permanent partial functional impairment. But Dr. Zimmerman further opined, after reviewing a 2001 MRI of claimant's back that he had a 5 percent preexisting functional impairment.

As previously noted, both doctors recited that their ratings were based upon the AMA *Guides*. In this instance, the evidentiary record fails to persuade the Board that either rating is more credible. Consequently, the Board will accord equal weight to both opinions. Averaging the two opinions results in a 15.5 percent impairment. Deducting the 5 percent preexisting functional impairment, as required by K.S.A. 44-501(c), the Board finds claimant suffers a 10.5 percent whole person functional impairment as a result of the injuries suffered on August 16, 2004.

## AWARD

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 13, 2007, is modified to find claimant suffered a 10.5 percent permanent partial whole person functional impairment.

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[4] K.S.A. 44-510e(a).

[5] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[6] *Graff v. Trans World Airlines,* 267 Kan. 854, 983 P.2d 258 (1999).

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The claimant is entitled to 50.10 weeks of temporary total disability compensation at the rate of $254.45 per week or $12,747.95 followed by 39.89 weeks of permanent partial disability compensation at the rate of $254.45 per week or $10,150.01 for a 10.5 percent functional disability, making a total award of $22,897.96, which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this _____ day of June 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier